

# ACCESSION TO THE EU AND THE CZECH CONSTITUTIONAL JUDICIARY

*Ivo Šlosarčík*

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## **1. Constitutional Courts and the European integration**

In the first few months of 2004 both experts and the general public focused their attention on the Czech Constitutional Court once more. The reason for this were problems concerning the appointment of new judges, the temporary reduced size of the Constitutional Court resulting in a loss of its competence to assess compliance of laws with the Constitution, and, last but not least, the disputes between the Czech President and the Senate over the possible constitutional implications of vacancies in the Constitutional Court. The issue that has been discussed only marginally is the role of the Constitutional Court in the integration of the Czech Republic into the European Union.

The integration process of the Member States' Constitutional Courts into the European structures follows two lines (which are only partly interrelated): firstly, it is the communication between the domestic Constitutional Court and the European Court of Justice; secondly, the role of the domestic Constitutional Court in the disputes related to the Community.

The history of the European integration shows most varied approaches of the Constitutional Courts to these cases as well as their conflicts with the European Court of Justice and other bodies involved in the European integration. The conflicts can be divided into two main groups:

particular disputes over the application or non-application of the EC law in the Member State when the Constitutional Court is, as a last resort, asked to act against the application of the European legislation that is allegedly contradictory to domestic legal standards;

abstract disputes when the Constitutional Court obstructs ratification of changes to the European primary legislation on the grounds that the sovereignty of the State would be infringed.

France, Ireland, and Germany represent three different systems of the constitutional judiciary (France = the Constitutional Council, Ireland = the Supreme Court, Germany = the Constitutional Court) that have been in various periods of their existence involved in both sorts of conflicts with the European law. However, similar conflicts have arisen elsewhere too (Italy, Denmark).

### **France**

The French Constitutional Council ignored the specificities of the European integration until 1992. This approach was based primarily on the absence of an explicit reference to the existence of the EC in the French 1958 Constitution. Although the French Constitution was enacted after the Treaty of Rome had been signed, there was no explicit mention of the EC in its original wording. There was only a marginal note referring to the EC indirectly in the clause on international agreements. The international agreements that have been duly ratified and declared are in France immediately applicable and they take precedence over the legislation; this approach is based on the traditional French monism that is similar to the current Czech constitutional clause on international agreements.

The Constitutional Council refused to assess the compatibility of the European secondary legislation with the French legislation and left the decision-making procedure in these cases to general courts. By this the French constitutional tradition soon got into conflict with the principle of supremacy of the EC law that had been formulated by the ECJ. The "Matter Doctrine", which dates back to the period between the First and the Second World War, acknowledged precedence of the international agreements over older French legislation only in cases when the agreement was ratified after the law opposing the given international commitment had been adopted. The Matter Doctrine was abandoned as early as in the 1960s by the French Cassation Court but the French Supreme Administrative Court (Conseil d'Etat) followed the Doctrine until the late 1980s and early 1990s when it was abandoned, as a different line was endorsed by the new generation. The Constitutional Court, whose passivity was indirectly responsible for this constitutional crisis around the French membership in the EC, was not directly involved in the issue.

The Constitutional Court was, on the other hand, a key institution in the ratification of the Maastricht and the Amsterdam Treaty, where it defined the limits of French sovereignty as well as the possibility to adapt these limits for international institutions. In 1992 the Constitutional Council obstructed the ratification of the Maastricht Treaty until the French Constitution was explicitly amended according to the requirements of the Constitutional Council. The Constitutional Council declared a part of the Maastricht Treaty (e.g. the chapters on EU citizenship and on the monetary union) as contradictory to the wording of the French Constitution. The grounds for this ruling were that it did not comply with general authorization to devolution of competences to international institutions that was tacitly mentioned in the French Constitution. A similar scenario was followed in the case of the Amsterdam Treaty, some parts of which were also declared unconstitutional by the Constitutional Council (cross-border movement of people, the asylum and the visa policy) – the ratification was conditioned by an amendment to the Constitution.

### **Ireland**

The Supreme Court of Ireland belongs to the system of general courts but it has the power to check on the compatibility of ordinary legislation with the Irish Constitution. An amendment to the Irish Constitution (adopted before the accession to the EEC in 1973) enabled ratification of the Accession Treaty. However, after the adoption of the Single European Act, the Irish Supreme

Court ruled in "Crotty v. Taoiseach" case that modifications of the European primary legislation "by which the extent or targets of the EC undergo significant changes" may be ratified only on the basis of an amendment to the Constitution and an explicit constitutional authorisation to the ratification of a new treaty. According to the Supreme Court the implementation of "political cooperation" in the Single European Act came under the category of such modifications. The ratification of the Single European Act was therefore preceded by a modification of the Irish Constitution (conditioned by a referendum). Similarly, the ratification of the Maastricht Treaty, the Amsterdam Treaty and the Nice Treaty was accompanied by corresponding amendments, though admittedly, without a judicial intervention.

In Ireland, the free movement of people and services guaranteed by the Community law entered into conflict with the protection of human life in pregnancy as established in the Irish Constitution. In the 1990s a series of judicial disputes in Ireland dealt with legitimacy of the attempts made by State to curb rights of Irish female citizens to travel to the EU Member States in order to obtain abortions (Attorney General v. X in 1992, Attorney General v. C in 1998). Much concern was also raised by the ban that was imposed on information campaigns organized by independent organizations for women's rights about the possibilities of abortion practised abroad (Dublin Well Woman, Open Door Counselling). These disputes accompanied by an intervention of the Supreme Court resulted in a constitutional compromise. Article 40.3.3 of the Constitution (the protection of human life in pregnancy and criminalization of abortions) was amended in the sense that "Article 40.3.3 shall not limit freedom to travel between the State and another state" and that "it shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state".

### **Germany**

The attitude of the German Constitutional Court to the European integration has, too, undergone an interesting development. The first constitutional crisis was started in 1974 when the Constitutional Court declared in its judgment referred to as "Solange I" that the protection of human rights guaranteed by the German "Fundamental Law" (Grundgesetz) would be principally based on German standards rather than on the European law. The Constitutional Court did not change its attitude until 1986, i.e. twelve years later, when it issued a judgment referred to as "Solange II" in which the efficiency of human rights protection established in the EC law was declared as comparable with the protection in the German Constitution. The Constitutional Court also ruled that as long as this efficiency was preserved, there was no need to review compatibility of the European legal norms with the German constitutional law. The same attitude has been taken by the Constitutional Court in the recent "Banana Judgment". In this case the Constitutional Court was asked to assess compatibility of the new regime for banana import into the EU (Regulation 404/93) with the German legal system.

An intervention of the Constitutional Court marked also the German ratification of the Maastricht Treaty. In the Federal Republic of Germany, the ratification of the Maastricht Treaty was preceded by an amendment to the "Fundamental Law". Do The "European Article" No. 23, by which the German membership in the European Union became explicitly authorized, was

inserted into the text of the Constitution. However, the compatibility between the "Europa-Artikel" and what is referred to as the "super-rigid" articles of the German "Fundamental Law" was challenged, and the ensuing dispute was brought before the Constitutional Court; the "Europa-Artikel" was alleged to oppose the principle of democracy and people's sovereignty. The Constitutional Court declared the membership in the European Union as compatible with the German constitutional order but it also defined the limits for the further development of the European integration.

### **2. Formal integration of the Czech Constitutional Court into the ECJ**

The relation between the Czech Constitutional Court and the European integration has been formally established by the Euro-amendment to the Czech Constitution and the related Constitutional Law about referendum on the Czech Republic's accession to the EU. Due to the Euro-amendment international agreements may be directly effective (Article 10) and the powers of the Czech Republic may be devolved on international institutions (Article 10a). Further, the Euro-amendment has enabled to redefine powers held by general courts (assessment of compatibility between laws and international commitments of the Czech Republic) and by the Constitutional Court (preliminary review of compatibility between the Czech constitutional order and the international agreements signed by the Czech Republic). It is also important that a general clause declaring the duty of the Czech Republic to respect the international law was inserted into the constitutional text. The latest case-law of the Constitutional Court, however, suggests that the Constitutional Court itself could possibly interpret the Euro-amendment differently than the legislators have actually expected – in particular by declaring different standards for dealing with international agreements on human rights v. other international agreements.

Another way of "communication" between the Constitutional Court and the ECJ or other EU bodies is the review of the European secondary legislation (+ agreements made by the EC where a preliminary review of compatibility with primary legislation before the ECJ is also possible). The Constitutional Court is not a privileged participant – therefore, it is not entitled to contest European norms unless it meets the requirements stated for an unprivileged participant; i.e. the Constitutional Court must be addressee of the relevant norm or it is necessary that the condition of "direct and immediate impact" on the Court be satisfied. Another possibility is that the Constitutional Court will initiate further action and the norm will be contested in the name of the Czech Republic.

The activity or passivity of the Constitutional Court can also provoke the European Commission to file an enforcement action against the Czech Republic for non-fulfilment of the *acquis communautaire* (to be decided by the European Court of Justice) or private parties can sue the Czech Republic for damages ensuing from breach of the EC law by Czech judiciary (the decision in this case will be left to the Czech domestic court). In situations when the European law is breached by a Member State, the ECJ rejects to regard the judicial independence as an exculpatory fact. The latest ECJ case-law (cases "Köbblers" and "Commission v. Italy", C-120/00) suggests not only an increasing tendency of the ECJ to identify breaches of the European law

by acts of judicial power but also to stress the fact that the State is held responsible for such breaches to private entities.

### **3. The formal domestic role of the Constitutional Court before the enlargement**

Before the accession of the Czech Republic to the European Union the Constitutional Court was already enabled, at least in theory, by the "Euro-amendment" to engage in the process of the European integration. The fact that the Constitutional Court did not make use of this possibility did not in any way hamper the accession of the Czech Republic to the EU.

On the basis of the Euro-amendment the Constitutional Court is entitled to review compatibility of the Czech constitutional order with international agreements signed by the Czech Republic. So far the Constitutional Court has not been commissioned to make such a review but such a situation will supposedly arise when it comes to the ratification of the Treaty establishing a European Constitution.

One of the more traditional tasks of the Constitutional Court was to exercise supervision over the referendum on accession of the Czech Republic to the European Union, as regards to its legality and regularity. The Constitutional Court rejected all complaints against the referendum. Similarly, the allegations that the referendum was unconstitutional as the public finances provided for the Euro-sceptic and Euro-optimistic information campaigns had not been justly distributed were dismissed by the Constitutional Court as unsubstantiated.

### **4. The formal domestic role of the Constitutional Court after the enlargement**

The sphere of the Constitutional Court's competences has been much larger since 1 May 2004. The Euro-amendment has assigned the duty to assess compatibility between the Czech and the EU legislation to Czech general courts. It has been left open to discussion whether this form of review allows the EU to retain its powers to supervise at least the compatibility of the Czech legislation with international human rights agreements. This possibility has been already suggested by the Constitutional Court. The situation in the first years of the EU membership when the passivity of Czech general courts might result in their failure to assess compliance of the Czech legislation with international commitments would thereby be at least partially solved by the activist Constitutional Court.

The Constitutional Court is also entitled to submit preliminary questions to the European Court of Justice. With regard to the preliminary question the Constitutional Court is considered by the EC law to be a "court or tribunal of the Member State", which is entitled to submit preliminary questions to the ECJ relating to interpretation or applicability of the European law. The question is whether the Constitutional Court is actually bound to submit the preliminary questions or not. The former interpretation could be upheld by the fact that in the domestic legislation there is no remedy against the judgments made by the Constitutional Court. The Constitutional Court can, however, take a different line here. For example in the case of a constitutional complaint,

it can adjudge that the general court that failed to submit preliminary question infringed the rights guaranteed by the legal system of the Czech Republic. In this situation the Constitutional Court will not refer to the ECJ in its own name but it will reverse the judgment of the corresponding general court against which the complaint was lodged and call on the general court to refer to the ECJ autonomously.

It has not been solved yet whether the possibility to refer to the ECJ should be explicitly regulated in the Constitutional Court Act. Czech legislators should also consider introducing a new institution to the constitutional judiciary that would be analogous to the "re-trial" ("obnova řízení") before the Constitutional Court in case that new case-law of the European Court of Justice emerged that conflicts with the original jurisprudence of the Constitutional Court. This would be, once again, a reaction to the latest trends in the ECJ case-law (Kühne & Heitz, C-453/2000). A modification of the Constitutional Court's procedural legislation would also make it possible to revise past resolutions of the Constitutional Court with respect to the decisions of the European Court of Human Rights.

Moreover, the first year of the EU membership will probably answer the question whether the term "international agreement" regulated in Article 10 of the Constitution covers also the European (obligatory) secondary legislation – this will be crucial for direct effect of regulations, decisions and (to some extend) directives in Czech legal order. Further, it is necessary to define the position of the Constitutional Court in the review of compatibility between the Czech legal norms and international human rights agreements. Surprisingly enough, the Constitutional Court insisted that these be treated separately from other international agreements (ruling No. 406/2002) even if the decision on their privileged status had been revoked by Article 10 of the Euro-amendment.

### **5. The informal relation of the Constitutional Court to the European integration**

Despite the formal relations regulated by both the Czech constitutional legislation and the European law, the definition of relationship between the Constitutional Court and the ECJ may still be affected by personal links or the domestic legal culture. The main questions are the following:

Can the attitude of the Constitutional Court be influenced by the current appointment of its members? Has the relation to the European integration been discussed in the debate concerning the Senate's approval or disapproval with the candidates nominated by the President?

Which implications for the relationship between the Constitutional Court and the ECJ will have the fact that the first judge from the Czech Republic in the ECJ was originally a member of the Constitutional Court?

Informal contacts of the ECJ judge from the Czech Republic with the Czech judiciary. According to the EC Treaty, ECJ judges are obliged to act independently of the Member States by which they were appointed. The same rule is applicable e.g. to the European Commissioners, whose contact with the domestic environment is in fact never suspended. Can a similar scenario be applied in the case of the ECJ judge from the Czech Republic?

### **6. Scenarios**

The position of the Czech Constitutional Court towards the European integration can basically develop in three ways:

#### **Scenario I – Cooperation and coordination**

The Czech Constitutional Court will adopt *acquis communautaire* and the doctrine of its of unconditional supremacy as an integral part of the Czech constitutional and legal system. The Czech Constitutional Court often refers to the ECJ. It also tries to get actively involved in the formulation of new EC norms – its involvement in the creation of the norms is either direct or indirect, the latter being procured by the Ministry of Justice or by a judicial review of the secondary legislation initiated by a complaint filed by the Czech Republic. The Constitutional Court revokes the Czech legal norms in reaction to the ECJ case-law – by doing this, the Constitutional Court exceeds the requirements of the EC law which demands supremacy in application but not in validity.

#### **Scenario II – Peaceful coexistence**

The attitude of the Constitutional Court to the existence of the ECJ is rather indifferent. It regards the Czech and the European legal systems as two separated systems whose relationship can be described as a "peaceful coexistence". The Constitutional Court does not refer to the ECJ. The communication with the ECJ is for the most part devolved on general courts. The scenario of the "peaceful coexistence" has its relevancy especially in view of the fact that the failure of the Czech courts to perform their legal obligations and refer to the ECJ with a preliminary question is deemed by the Constitutional Court to be an infringement on the due process rights guaranteed by the Constitution.

#### **Scenario III - Conflict**

The Czech Constitutional Court explicitly declares that some parts of the Czech legal system are superior both to the current and the future EC law (human rights, issues connected with the Beneš Decrees, nuclear energy policy), which in fact leads to the creation of a Czech analogy to the German "Solange" in areas that the Constitutional Court considers as enormously sensitive. The constitutional complaints against non-application of the European law by the Czech public administration and general courts are rejected. The Constitutional Court obstructs further devolvement of competence on the EU that is regulated by Article 10a; it requires an explicit modification of the Constitution or it formulates a doctrine of the State's "super-sovereignty" that cannot be transferred onto any other international institution.